



New York State Department of Labor
Andrew M. Cuomo, Governor
Roberta Reardon, Commissioner

DATE November 13, 2017

Chanel T. McCarthy
The Knoer Group, PLLC
424 Main Street, Suite 1820
Buffalo, NY 14202

Buffalo Chop House, Inc.

CASE NO: [REDACTED]

Dear Ms. McCarthy:

We have received your letter of July 24th. As a result of your letter, we have reviewed our findings noted in our letter of April 17th in relation to your response.

It has been determined that the employer is rounding employees' time down and not paying employees for all time worked. An audit of three random weeks was conducted and it was determined that employees work times were rounded down to the next lower quarter hour. On average this resulted in employees not being paid for approximately 7 and ½ minutes per week.

There were 158 hourly paychecks issued during the three random weeks. Of the 158 checks issued, three employees' times were either on the hour, quarter, half hour or three quarter hours, these are the only employees paid for all hours worked. The remaining 155 checks had the hours rounded down. No employee had his or her time rounded up to the next quarter hour. Based on these findings wages due have been adjusted to reflect 7.5 minutes per week.

Rounding of employees' work time is allowed but the employers must round both up and down so over an extended period the employee does not suffer a loss of wages. The Chop House employees are not being paid for all hours worked and the employer is in violation of labor law. Enclosed is a Notice of Violation citing Section 191.1a. – Failure to pay a manual worker wages within 7 days of when the wages were earned. Section 661 - payroll records noting inaccurate hours worked and wages earned.

The wages due for the rounding of hours and the failure to pay the minimum wage is \$9,490.53 plus liquidated damages of \$2,372.63 for a total of \$11,863.16 due these workers.

The Department has computed wages for the workers who were not paid the proper minimum wage during the audit period. A self-audit will not be required.



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The Department disagrees with your determination that employers are allowed add various fees, charges and assessments together on credit card sales and then deduct the full percentage from the servers' tips.

Employers are allowed to keep a portion of the tips to cover the swipe percentage charged by the credit card companies. Employers are not allowed to deduct from the servers' tips for surcharges, markups, statements, access fees or other assessed charges as they are considered a cost of doing business and not the responsibility of the server.

The Department requested information on the initial swipe percentage charged by the four credit cards the Chop House accepts, so excess tip charges deducted from servers' tips could be computed. This information was not provided. The Department has computed for the tip appropriation based in 2.5% per credit card transaction.

As noted in the April 17th letter, tip appropriations have been assessed at \$35,032.17 with liquidated damages of \$8,758.04 for a total of \$43,790.21. It was requested that a self-audit be conducted in order to determine how much was due each server, the self-audit was due on May 17, 2017. The self-audit was never received as directed. A self-audit must be conducted and a report prepared, noting the distribution of the \$35,032.17 underpayment back to the servers. Include the last known address of the servers in the audit.

These workers are due a total of \$55,653.37 in wages, tips and liquidated damages. Please forward a check or money order, made payable to the Commissioner of Labor, in the amount of \$55,653.37 less any legal deductions by November 27, 2017. If legal deductions are taken, note the net wage and legal deductions for each employee.

It is required that the employer conduct an up to date self-audit, from February 1, 2017 through the date employees the employer comes into compliance with Labor Law.

Failure to remit payment by November 27, 2017 will result in the issuance of an Order to Comply including all wages, 100% in liquidated damages, 16% interest per annum and civil penalties not to exceed 200% of the wages due. The Order will name Mark Croce as a responsible party as well as the corporation.

Sincerely,

James Donohue
Sr Labor Standards Investigator